

FAIR INSURANCE PRACTICES ACT

DECEMBER 1 (legislative day, NOVEMBER 30), 1982.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2204]

The Committee on Commerce, Science and Transportation, to which was referred the bill (S. 2204) to promote interstate commerce by prohibiting discrimination in the writing and selling of insurance contracts, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF BILL

It is the purpose of the bill to prohibit discrimination in insurance and annuities on the basis of race, color, religion, sex, or national origin, with respect to access, availability of coverage, terms, conditions, rates, benefits and requirements and in the methods of determining them. Primary jurisdiction for enforcement of the act is the responsibility of the States. It would not in any other way affect the States authority to regulate the business of insurance under the McCarran Ferguson Act.

BACKGROUND AND NEED

S. 2204, as reported, is intended to extend the established civil rights policy of the United States to the business of insurance. Fundamental civil rights policy in the United States is that no *individual* shall be treated differently because of his or her membership in a

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racial, sexual, religious or ethnic group. This policy has been applied under federal laws or by the courts to employment, credit, housing, public accommodations, transportation, recreation, voting and athletics. The time has come to extend this policy to the business of insurance.

S. 2204 was drafted on the pattern of three present laws which have helped to establish the Nation's position against discrimination on the basis of race, color, religion, sex, or national origin. These are:

Title VII of the Civil Rights Act of 1964, prohibiting such discrimination in employment.

Title VIII of the Civil Rights Act of 1968, prohibiting such discrimination in housing.

The Equal Credit Opportunity Act, prohibiting such discrimination in consumer credit and finance.

The bill, as reported, is supported by civil rights organizations including the Women's Equity Action League, the Federation of Business and Professional Women's Clubs, the American Association of University Women, the National Women's Political Caucus, the National Organization for Women, as well as the Leadership Conference on Civil Rights, senior citizen groups and the AFL-CIO and other labor organizations.¹

Testimony before the Committee demonstrated that discrimination by insurers on the basis of sex and race does exist. Example after example of discrimination in insurance rating and availability on the basis of sex was presented by witnesses testifying before the Senate Commerce Committee at hearings held on July 15, 1982. For example:

Automobile insurance

Young men pay higher premiums for auto insurance than do young women.

Life insurance

Men must pay higher premiums for the same amount of life insurance, or get lesser amounts of insurance coverage for the same premium, than do women. (Ironically, since most men designate women as their beneficiaries, the impact of such smaller amounts of insurance falls on women.)

Premium rates for women in life insurance are calculated on male-based mortality tables and then "set-back" 3 years as a substitute at

¹ Among the groups indicating support for Federal legislation prohibiting discrimination in insurance are: American Association of Retired Persons, American Association of University Women, American Home Economics Association, American Veterans Committee, Inc., Anti-Defamation League of B'nai Brith, Center for National Policy Review, Coal Employment Project, Displaced Homemakers Network, Inc., Jewish War Veterans of the U.S.A., Leadership Conference on Civil Rights, Mexican American Legal Defense Fund, National Association of Social Workers, National Catholic Conference for Interracial Justice, National Community Action Agency Director's Association, National Conference of Black Mayors, Inc., National Consumers League, National Council of Jewish Women, National Council of Negro Women, Inc., National Council of Senior Citizens, National Federation of Business and Professional Women's Clubs, Inc., National Ladies Auxiliary of the Jewish War Veterans of the U.S.A., National Insurance Consumer Organization, National Woman's Party, National Women's Health Network, National Women's Political Caucus, Office of Legislative Affairs, Women's Division, The General Board of Global Ministries, United Methodist Church, Older Women's League, Organization of Chinese Americans, Rural American Women, Washington Office of the Episcopal Church, Women's Equity Action League (WEAL), Women's Law Project, Women's Legal Defense Fund, AFL-CIO, American Civil Liberties Union, NAACP, American Association of University Professors, National Organization For Women (NOW), Women, U.S.A., U.S. Commission on Civil Rights, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), American Nurse's Association, National Association of Farmworkers Organizations, National Urban League.

every age to construct a female table. Thus the tables used by the industry are not based on female mortality experience.

Under some life insurance policies, a married woman can purchase coverage only up to the amount of coverage held by her husband.

Retirement and pension benefits

Women receive smaller monthly annuity payments than do men.

Women receive lower monthly retirement benefits than men who have paid identical premiums.

Disability

Disability income insurance is often not available to women whose jobs are performed at home, while this insurance is available to men with identical job and risk factors.

Disability income insurance for women may be excluded for periods of disability resulting from medical or surgical treatment of sex-linked disorders.

Premium rates in disability insurance are often much higher for women than for men carrying identical or better coverage.

Ten out of 13 insurance companies surveyed in Pennsylvania charged higher premium rates for women than for men carrying identical or better disability coverage.

Women are charged rates 150 percent higher than men in the same job classification in New York for disability insurance.

A rate of differential of 45-115 percent exists between the sexes in Colorado.

Generally, disability insurance policies provide:

Longer waiting periods for women in number of days an insured must be disabled before benefits are payable;

Shorter basic periods—maximum time for which an insured is deemed completely unable to work—usually 5 years for men, 2 years for women; and

Shorter benefits periods—maximum time for which the insured is paid benefits—for women.

Health Insurance

Health insurance of private insurance companies often excludes pregnancy and its related complications from coverage. They claim that pregnancy is a voluntary condition. Yet, other voluntary disabilities such as vasectomies are generally covered for men.

When maternity benefits are provided, they are extremely low. Only 38-44 percent of medical costs due to pregnancy are reimbursed, according to a 1975 Michigan survey.

Female policy holders pay considerably more for health insurance than male policyholders. Without maternity coverage, an Iowa study showed that women pay as much as 50 percent more than men for identical policies in health insurance.

Under the guise of coordination of benefits provisions in many State insurance regulations, women are systematically denied benefits for their dependents even though they have paid for this coverage. Typical provisions call for benefits to be paid on a mother's policy only if the father will attest to the fact that he assumes no responsibility for the children; some companies require that verification for

each claim, even when the parents are divorced and the mother has full financial responsibility as well as custody of the children—and in fact even when it is impossible to find the father.

The insurance industry opposes any restrictions on the use of sex to determine insurance rates. As noted insurers frequently charge women less than most men for individual life and auto insurance but more than most men for individual health and disability insurance and annuities (group policies are generally gender neutral). These differences are defended on the ground that women have lower age-specific rates of death and lower rates of auto accidents, and higher rates of illness, than do men. Civil rights proponents emphasize that these rates are based on group averages that do not describe individual cases. For example, the fact is that the ages of most men and women can be paired at death. The Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAACREF) filed figures in a recent case before the Supreme Court *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) concerning the survival experience of 100,000 males and 100,000 females retiring at age 65. TIAACREF's figures showed that 86 percent of the women had the same death age as 86 percent of the men. Thus, because 14 percent of the women did not match the death ages of the men, all women receive lesser monthly retirement benefits than all the men.² And, all men receive higher monthly retirement benefits than all the women who are otherwise similarly situated.

Similarly, careful male drivers pay higher auto insurance rates based on the male average, while careless female drivers benefit from insurers' experience with other women. From the civil rights perspective, charging all men more for auto insurance because of average male loss experience is like paying all blacks less because average black test scores are lower.

Sex-based insurance discrimination is detrimental to and affects all women. Dr. Mary Grey, president of the Women's Equity Action League, testified before the Senate Committee on Commerce, Science, and Transportation on July 15, 1982:

Insurance costs and availability are especially important to women who work and women who are heads of household: 42 percent of all women are now in the workforce; 60 percent of these women are widowed, divorced or unmarried or work to raise their family income to a minimum of \$10,000 a year. Seventeen percent of all American families are single parent families headed by a women.

Many of the discriminatory practices of the insurance industry are based on out-moded stereotypes. For example, limitation of access to disability insurance, as well as the assessment of higher rates, is premised on the belief that for women work is a mere diversion, to be given up at the first opportunity if disability insurance is available.

² The Committee, however, did not support this bill solely on the basis of the "overlap theory," or any other theory. Rather, the Committee supports the bill because treating men and women equally is a question of "simple justice."

The most basic goal of U.S. civil rights policy is individual equality—that *individuals* should be treated without regard to color, race, religion, national origin or sex. S. 2204 applies this tradition of equality to the business of insurance. The insurance industry contends that classification in insurance and annuities on the basis of sex is proper because men and women as a class represent different risks and fairness requires that each class of risk be charged rates appropriate to the costs arising from the class. This “separate but equal” treatment results in persons being evaluated within the context of their sex first, rather than being evaluated on their own personal characteristics. The arguments parallel those previously used by State insurance departments in the past when attempting to justify discrimination based on race.³ Blacks have a shorter life expectancy than whites. To reflect this actuarial fact insurance companies in the 1800’s began charging higher premium rates for blacks lives to cover the higher mortality.

Thus, in its announcement of March 10, 1881, that policies on “colored lives” would have two-thirds face value of policies on white lives for the same premium, the Prudential Insurance Company contended that its action:

... was not only justified, but necessary for its own safety and equity to the white policyholders, who as a class are subject to a mortality less than two-thirds as high as the rate prevailing among the colored people.

The Insurance Commissioner of Massachusetts, who approved that rate differential, stated in his 1884 report:

The whole structure of life insurance rests upon a calculation of the probabilities of longevity and a just proportion of insurance charge to the risk taken, and to compel a company to insure for the same rates different classes of people with different prospect of longevity would be to establish a grossly unjust discrimination against the longer-lived class in favor of the shorter-lived class.

When legislation was introduced in various state legislatures to prohibit such race discrimination, the industry’s viewpoint was expressed in the February 5, 1891, “Spectator” as follows:

The color line is not drawn simply because the applicants are negroes—the world is too progressive for that—but a

³ The insurance industry gradually discontinued its practices of charging higher premiums, or providing lesser coverage for the same premium to blacks than to whites when various States (for example, Massachusetts, Connecticut, Ohio, New York, Michigan, Rhode Island, Minnesota, New Jersey, et cetera) enacted laws prohibiting such race discrimination in life insurance premiums. Nevertheless, many companies continued to underwrite policies more strictly for blacks than for whites and for a long period, to discourage issuance of insurance for blacks by, for example, paying no commissions to agents on policies sold to blacks. (Frederick L. Hoffman, *History of the Prudential Insurance Co. of America*, pp. 137–139, 153, 185, 207, 209 (1900); Marquis James, “The Metropolitan Life—A Study in Business Growth,” pp. 338, 339, 445 fns. 69, 70 (1947); Haley Fiske & Raymond V. Carpenter, “An Epoch in Life Insurance,” pp. 12, 45 (2nd ed., 1924).)

However, there are many states whose laws do not prohibit race discrimination in insurance, or whose laws specifically permit any classification which is actuarially established. Indeed the State Insurance Department of at least two states have indicated that race classification in insurance would be permitted if based on “valid actuarial tables” or “statistical . . . reliable data”. (Hearings “Nondiscrimination in Insurance”, before Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 96th Cong., 2nd sess. on H.R. 100, Aug. 21, 1980, p. 165.)

distinction is made on account of the fact that companies can not afford to grant policies at the same rates to colored as to white applicants, and any legislation which is intended to force them so to do is practically tyrannous. Fire insurance companies are not prohibited from charging higher premiums on frame than brick or stonebuilt properties, and yet they are in just the same position as life insurance companies that adjust the difficulty of increased mortality amongst negroes, by fixing a rate at which they can safely and with equal chance of profit as from whites, grant them assurance.

Today, the insurance industry makes the same almost word-for-word arguments to justify sex discrimination, as were used to justify race discrimination, in life insurance.

For example, one of the Nation's major insurance and annuity companies (Teachers Insurance and Annuity Association) filed a brief in the U.S. Supreme Court in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), seeking to justify sex differentials in retirement plans, as follows:

Principles of risk classification are basic to insurance and retirement plans. . . . If individuals are forced to pay premiums which subsidize other persons' risks that are substantially greater than their own (e.g., owners of brick homes near a fire department paying the same premiums as owners of wooden homes remotely located), they will eventually withdraw from the pool.

The object of classification for the funding and payment of lifetime pension benefits, then, is to classify into groups individuals having very close to the same risk in terms of longevity.

The representative of the American Council on Life Insurance who on August 21, 1980, testified before the House subcommittee considering the same legislation as S. 2204, stated:⁴

Insurance costs unlike any other industry's costs, are based on the physical attributes of the item insured. Fire insurance costs are based on the physical characteristics of the building, i.e., whether it is wooden or brick, not who owns the building, female or male. Similarly, life and health insurance costs are based on the physical characteristics of the body insured. Females and Males have different physical characteristics, different biochemistry and consequently different mortality and morbidity.

In testimony, on July 15, 1982, before the Senate Committee on Commerce, Science, and Transportation, the American Council of Life Insurance stated:

We oppose the enactment of S. 2204. Our member companies do not discriminate on the basis of race, color, religion, or national origin, and do not discriminate on the basis of sex with regard to the availability of coverage. Therefore, there is no need for this legislation in these regards. On the other hand, our member companies need to be able to reflect

⁴ Hearings, fn. 4, supra, p. 78.

mortality differences between the sexes in pricing their life insurance and annuity products, and this legislation would do harm in prohibiting the recognition of those differences.

The insurance industry has attempted to distinguish the use of race-based mortality tables from the use of sex-based tables on the ground that black mortality has fallen strikingly in recent years. However, today, at many age levels there is a greater difference between black and white mortality rates than between male and female mortality rates. For example, the U.S. Life Tables, 1969-71, published by the National Center for Health Statistics, May 1975, list the following mortality rates per 100,000:

	White males	Black males	White females	Black females	Total white population	Total black population
At birth-----	892	522	686	1, 170	792	1, 348
At age:						
10-----	84	49	25	34	29	41
20-----	190	372	44	124	126	242
30-----	170	558	84	236	127	383
40-----	340	966	193	543	265	735
45-----	555	1, 309	308	773	428	1, 020
50-----	892	1, 788	466	1, 068	673	1, 403
55-----	1, 452	2, 445	699	1, 456	1, 026	1, 916
60-----	2, 258	3, 308	1, 027	2, 018	1, 612	2, 614
65-----	3, 386	4, 386	1, 563	2, 847	2, 397	3, 537
70-----	4, 916	5, 965	2, 513	4, 026	3, 557	4, 887
75-----	7, 231	7, 887	4, 255	5, 431	5, 491	6, 513

These figures show the following race-sex relationships:

(a) At birth and at ages 30, 40, 45, 50 and 55, the mortality rate for black women is higher than for white men;

(b) At ages 40, 45 and 50, the difference in mortality rate between the total white population and the total black population is higher than the difference in mortality rate between black men and black women.

(c) At every age level from birth through age 55 (except age 20), the difference in mortality rate between the total white population and the total black population is higher than the difference in mortality rate between white men and white women.

Even if actuarial statistics for a group correctly reflect variations in auto accident rates or mortality due to sex, race, color, religion or national origin, that discrimination should not be permitted because it is contrary to the fundamental civil rights principle that no individual should be discriminated against or be treated differently because of his or her membership in a group designated by race, color, religion, sex or national origin. The U.S. Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) stated that "since sex, like race and national origin, is an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex would seem to violate the basic concept of a system that legal burdens should bear some relationship to individual responsibility." Administrative convenience cannot justify differential treatment based on invidious gender stereotypes. The Supreme Court has rejected administrative convenience as a sufficiently important objective to justify gender based classifications.

In *Craig v. Boren*, 429 U.S. 190 (1976) the Supreme Court over-turned a State law under which 18 through 20 year old men were pro-

hibited from purchasing beer, while females were not, because statistics revealed that males in that age group had greater accident and arrest records for driving while intoxicated. The driving performance statistics, in the Court's view, could not support the conclusion that the gender based distinction closely enough serves to achieve the objective and therefore the distinction cannot under past decisions withstand equal protection challenges.

Less than 6 percent of all males and 4 percent of all female drivers will have an accident in a given year. For the youth categories, in no age group do female drivers involved in accidents exceed 7 percent and for males the average is 9 percent. Because more than 90 percent of either males or females will not be involved in an accident during a given year, the usual length of a contract for insurance, gender is an inaccurate proxy for other, more germane bases of classification. In light of the weak relationship between gender and accident involvement, gender classification schemes in automobile insurance are unable to meet equal protection standards. "In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose fitting generalities concerning the . . . tendencies of aggregate groups."

In *Mississippi University for Women et al. v. Hogan*, 50 U.S.L.W. 5068 (1982), the Supreme Court stated:

The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially to the achievement of those objectives . . ."

As previously noted the U.S. Congress, too, has spoken with regard to sex discrimination. As recently as 1964, the Congress passed the Equal Employment Opportunity Act also known as Title VII of the Civil Rights Act of 1964, as amended. That act states in part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex or national origin . . . (emphasis added) 42 USC S2000-2(a)(1).

The question Congress settled by passage of this act was whether to require equality in employment for groups or equality in employment for individuals. To illustrate this issue, a University of Chicago Law Review article⁵ described the case of *Boe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969), in which the employer refused to hire women for certain manufacturing jobs because employees in those jobs had to lift heavy weights. The exclusion of women was considered discrimination against the individual women and thus illegal under

⁵ Brilmayer, Hekker, Laycock and Sullivan, Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis, 47 Univ of Chicago Law Review 3, pp. 505-560 (1980).

Title VII of the Civil Rights Act of 1964. The fact that many women were unable to lift the weights was irrelevant to the case of a woman who could; sex could not be used to predict her weight lifting ability. The company was permitted, however, to require applicants for these jobs to pass a weight-lifting test. This policy would have a disparate impact on women as a group and the company would have to justify it by showing business necessity—in this case, that lifting weights was necessary to operation of the plant.

The authors of the University of Chicago Law Review article conclude:

The association between sex and mortality, sex and morbidity, and sex and auto accidents, are no different from any other association between forbidden and legitimate criteria. American women as a group currently live longer than American men as a group, just as they are able to lift less weight as a group. But some women will die earlier than some men, just as some will be able to lift more weight. An employer who pays annuities on the basis of integrated tables in effect distinguishes among his employees on the permissible basis of longevity, for those individuals who live the longest will collect the most periodic payments and thus the largest total sum. Of course, the employer's practice may have an unequal impact on men as a group for as a group they may not live to collect as many periodic payments as women. But, if he tries to avoid this impact by using segregated tables—making larger periodic payments to all men—he distinguishes on the basis of sex. This would be disparate treatment, for individual men and women of equal longevity would be treated differently: both periodic benefits and total benefits will be greater for a man than for a woman of equal longevity.

Further many courts have rejected the argument that sex (or race) discrimination in insurance or annuities can be justified by actuarial tables comparing the life expectancy of a group—of females, or whites—with that of another group—of males, or blacks. Some of these court decisions are:

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978);

EEOC v. Colby College, et al., 589 F. 2d 1139 (CA 1, 1978); and

Spirit v. TIAA-CREF, 475 F. Supp. 1298 and 1306 (S.D., N.Y. 1979); *affm'd*; 29 FEP Cases pg. 1599 (1982).

The U.S. Supreme Court's decision in the *Manhart* case squarely rejected the insurance industry's argument that sex discrimination in a pension plan can be justified on the basis of actuarial statistics which indicate longer life expectancy for a group of females than for a group of males. The Court ruled that Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, focuses on the individual, and therefore:

Precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is re-

quired for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for [treating differently] an individual to whom the generalization does not apply . . . because there is no assurance that any individual woman [or man] . . . will actually fit the generalization. . . . (435 U.S. at p. 708).

The Court noted that "Many women do not live as long as the average man and many men outlive the average woman."

The *Manhart* decision clearly ruled that Title VII prohibits sex-based differentials in an annuity even though that differential is based on a characteristic—longer average life expectancy—which is statistically identifiable to a group of persons of one gender, but actually false as to the individual members within that group.

The Supreme Court decision, however, was based on Title VII of the 1964 Civil Rights Act which applies only to employment-related insurance and annuity policies. S. 2204 would extend this policy to all insurance and annuity contracts.

DISCUSSION OF ISSUES

Is sex a legitimate predictor of losses?

The insurance industry argues that civil rights policy cannot sensibly be applied to insurance because losses must be predicted in advance and sex is a legitimate predictor of losses.

1. *Life Expectancy.*—If sex is a legitimate predictor of losses so is race, religion or ethnic background, none of which are currently used by insurers to predict losses.

For example, insurers do not use separate tables for Mormons and Seventh Day Adventists who have a longer life expectancy than white persons generally or for Jews under 65, who have a shorter life expectancy than the average population, or for blacks, who have a substantially shorter life expectancy than the population as a whole.⁶

Thus, the insurance industry is inconsistent in saying that a statistical life expectancy differential justifies sex discrimination in insurance and annuities, but does not justify discrimination on the basis of race or religion. However, sex and race discrimination are basically alike. Each is as immoral and harmful as the other. Each imposes group discrimination on an individual because of an immutable factor—race, sex—even though that factor is not casually related to the life expectancy of that individual.

Insurance industry representatives attempt to minimize the inconsistency in their "race versus sex" arguments by saying that the mortality differences between whites and blacks "coincide with socioeconomic conditions," and that the former differences "have narrowed". They say that the mortality differences between males and females "are biological, stemming from different chromosome structures of the two sexes . . . different levels of production of prostaglandins between the sexes," and "are widening."

⁶ James E. Enstrom, "Cancer Mortality Among Mormons," 36 *Cancer* 825 (*Journal of American Cancer Society*, 1975); S. J. Fauman and A. J. Mayer, "Jewish Mortality in the United States," *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders*, Vol. 1—The Jews, Chapter 3, p. 33, reprinted in 41 *Human Biology* 416 (1969).

Those contentions are distorted and unsound. Even if the black-white differences in life expectancy are due to "socioeconomic conditions," those differences exist now, and the "socio-economic conditions" will probably persist for a long time. Their cost impacts are no different than the cost impacts of any life expectancy differences that now exist or may occur in the future because of any "biological conditions." Indeed, the very premise of the industry's argument—that male-female mortality differences are "biological"—is highly questionable. Male-female mortality differences have not been either universal or constant. Instead, they have varied in each generation, and in different geographical areas. There are many countries where females have had, or now have, lesser life expectancy—or what is more pertinent to insurance and annuities computation, greater mortality rates—than males. In the United States around 1920 female mortality at various ages exceeded male mortality. In much of the third world, including countries with nearly one-quarter of the world's population, men live as long or longer than women. In the developed countries, however, women now tend to live longer than men, but the differences are not uniform. The difference is less than 4 years in Hawaii but 9 years in Wyoming, 5 years in East Germany but 10 years in the Soviet Union.

Moreover, the various differences between male and female mortality have clearly been influenced and modified by changing behaviors and life styles and the adequacy of medical care, food, epidemics, etc. Thus, one-third of the excess of male over female deaths results from emphysema and lung cancer (which are linked to cigarette smoking), homicide, suicide, accidents, and liver cirrhosis (which is linked to alcohol consumption). Well over one-third (41 percent) of the excess of male deaths over female deaths results from coronary heart disease (which is linked to cigarette smoking and coronary-prone behavior). These behaviors and self-abuses, as well as the risks of occupational hazards, are more common, in our present culture, with men than with women. But they are not caused by the factor of sex. And as women increasingly engage in the activities and occupations of men, these causes of death kill more and more women.

The insurance industry uses the gender classification which it adopted in the 1950's largely to extend its marketing of life and auto insurance amongst women because it is easy to apply. Gender is immutable—easily recognized, rarely changed. The insurance industry largely ignores other more relevant classification criteria affecting the life expectancy of people, such as smoking habits, physical condition, geographic location, family health history, recreational and occupational activities, etc. Indeed, with respect to annuities, the industry recognizes only sex and age as significant risk classifications.

Only a few companies have in recent years used some of the relevant criteria. For example, on October 22, 1979, the State Mutual Life Assurance Co. of America issued a report at the annual meeting of the Society of Actuaries, covering 15 years experience involving 77,000 policy years of smokers for \$2.7 billion of life insurance and 127,000 policy years of non-smokers for \$5.6 billion of life insurance. That report showed that at many ages the mortality differentials between smokers and non-smokers exceeded the corresponding differentials

between male and female mortality. For example, at age 32, a non-smoker man has a life expectancy of 7.3 years longer than a smoking man, as compared to a 5 years differential between male and female life expectancy on the 1965-70 basic tables. But, according to State Mutual's president and chief executive officer, only 30 of the approximately 1,800 life insurance companies in the United States then offered lower premium rates for nonsmokers.

Another example is the fact that the life expectancy of persons living in Hawaii exceeds that of people living in the District of Columbia far more than does the life expectancy of females over males. But, insurance companies do not base their life insurance premiums on that geographical differential.

Thus, the insurance industry's emphasis upon "life expectancy" regarding sex classification, but virtual disregard of life expectancy as affected by other factors, wholly undermines its assertion that "Fairness requires that each class of risk be charged rates appropriate to the costs arising from the class."

The insurance industry's "life expectancy" argument is not only inconsistent with its asserted "fairness" principle, but is also technically distorted and discriminatory. The sex-differentiated actuarial tables which the insurance industry uses for life insurance have not been based on female mortality experience. Instead, the industry has simply used male-based mortality tables and applied an arbitrary setback of 3 years (or 5 or 6 years in some States) as a substitute at every age to construct a female table. Although separate female-based mortality tables were constructed for annuity purposes, they are not widely used because they are not regarded as actuarially credible.⁷

Furthermore, different sex-differentiated tables have generally been applied for insurance than for annuity purposes. For example, at age 30, the 1958 C.S.O. table is used to charge premiums for a female under a life insurance policy on an assumed mortality rate of 199 deaths per 10,000, while payout rates on an annuity contract for the same person are computed on the 1971 I.A.M. table which shows a mortality rate of 47 deaths per 10,000 at that age.⁸ Thus, one table is used to justify higher than necessary insurance premiums, and the other to justify lower than necessary annuity benefits. In addition, the data generally used is in dollars of exposure rather than numbers of individual deaths, a method which further distorts sex mortality rates since males carry at least 10 times the amount of insurance than females carry.⁹

In sum, there are many other factors besides "sex" that can be used to predict life expectancy. The use of suspect classifications is not necessary.

2. *The "hazardous driver" myth.*—The insurance industry charges much higher rates for automobile insurance policies on cars which may be operated by a young male. It does so, it says because its statistics show that young males are involved in more auto accidents, and those accidents are more expensive, than those involving females.

⁷ Fellers & Jackson, "non-Insured Pensioner Mortality: The UP-1984 Tables," 25 Proceedings, Conference of Actuaries in Public Practice 456, 459 (1976).

⁸ Greenlee and Keh, "The 1971 Group Mortality Table," 23 Transactions, Society of Actuaries 569, 601 (November, 1971); Cherry, "The 1971 Individual Annuity Mortality Table," *Ibid.*, 496, table 9.

⁹ Transactions, Society of Actuaries, 1975 Reports of Mortality Experience, table 9, pp. 1, 17.

However, the Committee questions the statistics upon which the industry relies. Two recent studies submitted to Congress by the Alliance of American Insurers showed that male drivers had more accidents and that those accidents were more expensive than those involving females. However, when mileage differences are accounted for females had many more accidents per mile and were 50 percent more expensive to insure on a per mile basis. Another study, conducted by the California Insurance Department, also proved that, on a mileage adjusted basis, in most age groups females had more accidents than males.

These data were recently carefully examined in many days of hearings by the New Jersey Insurance Department and by the New Jersey State Commission on Sex Discrimination in the Statutes. Their reports demonstrate that when accident statistics are correctly collected, to reflect ratios per numbers of drivers, and adjusted for mileage, those data show that females had more accidents per mile and per person and were more expensive to insure, than males.

The Commission's report, issued in September 1982, stated (pp. 5-6, 7):¹⁰

Sex in contrast to industry claims has very little explanatory power and does not create homogeneous groups. Sex is not an accurate predictor of accident risk. Sex is able to explain less than 5 percent of the total variation in risk and yet is responsible for rate differentials of many times greater magnitude. This results in large overcharges to many of the state's drivers. . . . It can be concluded that the use of sex as a factor violates the principle of actuarial fairness and should not be used. Gender based grouping does not reflect essential differences and results in large subsidies. Sex is not an accurate predictor of driving performance.

* * * * *

. . . . Because more than 90 percent of either males or females will not be involved in an accident during a given year, the usual length of a contract for [automobile] insurance, gender is an inaccurate proxy for other, more germane bases of classification.

Further, the Massachusetts State Rating Bureau concluded that years of driving experience and age are roughly equal predictors of loss, and that using sex as an additional variable did not contribute much more; therefore use of years of driving was a predictor "virtually indistinguishable" from the traditional measures.

But the distortion of statistics by the insurance industry is even greater. The Insurance Service Office, a rating bureau, and most auto insurance companies use a system for rating young male accident involvement that the Insurance Commissioner of Pennsylvania recently characterized as violating the State's Fair Trade law. Under that system, any accident involving a car which a young male is authorized

¹⁰ "Sex Discrimination in Automobile Insurance: An Analysis of the Data", Report issued September 1982 by the State of New Jersey Commission on Sex Discrimination in the Statutes, State House, Trenton, N.J., pp. 5-6, 7.

under the insurance policy to drive is listed as a "young male car accident", even though the young male is nowhere near the car and even though the accident was caused by someone else's fault.¹¹

Sex is utilized as a proxy or indirect measure of other more direct variables such as mileage and maturity. Insurance industry representatives assert that sex as a rating factor is a practical method of distributing costs—that it is somewhat less expensive to classify insureds by sex than to use other predictors. But civil rights policy has never allowed expense as a justification for disparate treatment. It is more expensive to identify poor readers and weight lifters than to identify blacks and women, but not even apologists for the insurance industry argue that employers should be allowed to hire only white males to save the expense of testing.

The Committee also questions whether sex is a legitimate predictor of losses for health and disability insurance purposes.

The following table is based on a study by the California Department of Employment (Report 1200, No. 12, for the year 1964) which was cited to the U.S. Supreme Court in the Appellee's Brief, p. 81, in *Geduldig v. Aiello*, 417 U.S. 484 (1974). That study showed that sex had almost nothing to do with duration of disability or with average disability days lost. Instead, income and age were far better explanatory variables than sex in predicting disability experience.

	Average number of weeks per claim by age				
	Total	Under 45	45 to 54	55 to 64	65 and over
Males earning less than \$4,000-----	8.1	6.5	8.6	10.9	13.0
Females, under \$4,000 per year-----	8.0	7.1	8.6	9.7	12.8
Males, over \$4,000 per year-----	6.5	5.2	6.7	8.3	11.0
Females, over \$4,000 per year-----	6.9	6.2	7.0	8.2	11.9

Still another study was cited in the January 25, 1979 letter by the President of the New York City Council to the Accident and Health Subcommittee—Sex Discrimination Task Force of the National Association of Insurance Commissioners (reprinted in *Nondiscrimination in Insurance: Hearing on S. 2477 before the Subcommittee on Antitrust, Monopoly and Business Rights, of the Senate Committee on the Judiciary, 96th Cong. 2d Sess. 395-400 (1980)*). That letter summarized the disability experience of two large New York City labor unions, (a) Locals 2, 3 and 5 of the United Storeworkers Union, and (d) District Council 37 of the Association of State, County and Municipal Employees, AFL-CIO. In the United Storeworkers Union, its female members had shorter average length of disability, lower morbidity, and lower average costs, than the male members. In the District Council 37, its female members had lower average length of disability, but higher disability costs due to more claims, than its male members. The City Council President's letter pointed out:

Male union members were disabled for longer periods of time because they generally suffered from more debilitat-

¹¹ *Mathes v. Hartford Accident and Indemnity Co.*, (Penn. Ins. Dept. Docket R78-7-2, April 17, 1980); affirmed by the Pennsylvania Commonwealth Court in *Hartford Accident and Indemnity Co. v. Insurance Commissioner*, No. 1184, C.D. 1980, 442 A. 2d 382 (March 10, 1982).

ing illnesses. The men had twice as many strokes, 60 percent as many heart attacks, and 30 percent more orthopedic injuries. Males also had a greater incidence of cancer. In comparison, 35 percent of all female disability was diagnosed as genital-urinary illness, which includes pregnancy. According to a union health plan official, the genital-urinary disabilities tend to be more limited in duration. Due to the shorter length of disability for women, the cost of the average female claim was 8 percent lower than the average male claim.

The data available from the two unions does not support the assertion of the commercial insurers that it necessarily costs more to insure women—one union had higher costs for men; the other had higher costs for women. Obviously, insurance costs are affected by other factors, including pregnancy (the cost of which cannot be solely attributed to women), occupation, and income level to name a few.

An important explanation for the higher costs experienced by the commercial insurers for female policyholders is the simple fact that disability insurance has never been available to women on a cost competitive basis. Since women have always paid significantly higher premiums than similarly-situated men for less comprehensive coverage, the commercial insurers have never sold disability to a broad spectrum of the female market. The higher costs for women can be at least partially attributed to adverse selection, whereby only women who feel they will use the coverage are willing to pay the high premiums. At more competitive rates, healthier women might purchase insurance, thereby lowering the cost of insuring women in the commercial market.

In addition to questioning whether sex is a legitimate predictor of losses, the Committee contends there are many other ways besides race, sex, or national origin to predict losses. Losses can be predicted by considering all humans as a single group, or by using a wide variety of unforbidden criteria to classify the loss data. Thus, weight, build, physical condition, personal and family history, occupation, habits, aviation, military service, residence, hobbies, smoking, and exercise patterns have at times been used to predict mortality in the sale of individual life insurance. Life expectancy also varies widely by marital status, socioeconomic status, and state of residence—in many cases, more widely than it varies by sex. Similarly, automobile insureds can be grouped by factors such as past traffic offenses, past accidents, past claims, kind of automobile driven, how often the car is used, driving experience, education, and age.

In testimony before the Senate Commerce Committee on July 15, 1982, Mr. Sanford Squires of Commercial Union Insurance Companies explained its new "Custom Auto Program" currently in effect in 40 states. This program does not use sex as a factor to classify and price automobile insurance policies. The rating factors used by Commercial Union Insurance Companies are: driving experience, vehicles use (business vs. pleasure); annual mileage; vehicle's owner/principal operator; driving record; claims history; vehicle safety devices;

driver training; territory; vehicle make and model; and model year. It should be pointed out that Commercial Union does set average premiums that are higher for males than females. The Committee does not object to this.

Will the prohibition on discrimination in insurance and annuities cause the subsidizing sex to quit buying insurance or destabilize insurance reserves?

If that were true, we would have encountered the same problems with respect to all the other groups for which the insurance industry does not compute separate actuarial tables. No company still uses separate tables by race. Whites live longer than blacks, and thus, by the industry's logic, whites subsidize blacks in life insurance. But whites have not quite buying life insurance. Rich people live longer than poor people, but rich people still buy life insurance. The difference in life expectancy between highly and poorly educated women is greater than the difference between the sexes, but educated women still buy life insurance. The difference in life expectancy between married and single men is greater than the difference between the sexes, but married men still buy life insurance.

Does the McCarran Act limit Congress' authority to regulate the business of insurance? And, if it doesn't, then is a Federal law necessary or appropriate?

The McCarran Act is not a limitation on Congress' own authority to regulate the business of insurance; it has exercised its authority in the past; and it is particularly appropriate for Congress to prohibit discrimination in insurance.

While the McCarran-Ferguson Act sets forth a general policy in support of State regulation of the business of insurance, nothing in that act prevents Congress from enacting statutes which specifically regulate insurance. Indeed, Congress has on previous occasions acted to address insurance issues: assuring adequate guidelines for pensions, 29 U.S.C. 1001 et seq. (ERISA); providing adequate regulation of supplemental health care benefits for senior citizens, 42 U.S.C. 1935ss (Baucus Amendment); and simplifying the methods by which manufacturers, wholesaler distributors and retailers can establish self insurance and group insurance programs, 15 U.S.C. 3901 et. seq. (The Product Liability Risk Retention Act). Thus, it is clear that Congress has the authority to act, and has acted on, matters relating to insurance. The issue in this case is whether racial and sexual discrimination is an appropriate matter for Congress to address. The Committee believes that it is.

First, Congress has acted to prohibit discrimination in other areas, for example, employment, housing, and credit, and there is no reason for excluding insurance from the national policy against discrimination. And, Congress acted to prohibit discrimination in those areas even though many States had similar laws. These bans on discrimination have not displaced State regulation of industries traditionally subject to State control. The public accommodations title of the 1964 Civil Rights Act has not led to a general displacement of State regulation of hotels and restaurants; the Fair Housing Act has not led to a general displacement of state property law. The insurance in-

dustry is probably the most important exception to the general Federal policy against discrimination. S. 2204, as reported, would prohibit insurers from discriminating and would interfere in no other way.

Second, sex-differentials in insurance rates for life insurance, health insurance, disability insurance annuities and pensions are all based on national statistics. If the current practices are in fact unfair, then the most sensible way to address the problem is the enactment of a Federal law. This is so because even insurance industry representatives admit it would be difficult to operate under different rules in different States:

It is also important to bear in mind that once a few of the bellwether States . . . [adopt . . . regulations] they have a pervasive effect upon the industry, because the industry really can't live by doing business on one basis, in a few States, and on another basis in other States.¹²

In other words, it is not administratively feasible for the industry to operate under different rules regarding sex-based rating.

Finally, the insurance industry position that sex-discrimination has been or will be addressed by the States is a misleading statement. The insurance industry strongly opposes legislation to prohibit sex-based discrimination at both the Federal and State level. The fact is that while States prohibit some forms of sex discrimination with regard to the availability of coverage and conditions of insurance, few States bar such discrimination in rates and costs, as this bill does. A task force of the National Association of Insurance Commissioners concluded that "as rating characteristics, sex and marital status are seriously lacking in justification . . . and should therefore be prohibited as classification factors" in automobile insurance. The NAIC, however, has not followed through on this recommendation of its own task force.

What are the costs of the bill?

The Congressional Budget Office [CBO] estimated the costs of the bill to the Federal Government to be \$0.00 with one possible exception. CBO noted that the Justice Department estimated that the enforcement provisions of the bill may cost up to \$200,000. The Committee disagrees with the Justice Department estimate. Once the bill becomes law it is expected that the insurance industry will comply with the law and prosecution by the U.S. Attorney General will not be necessary. This was the case when Congress passed the Pregnancy Disability Act in 1978 and we see no reason to expect noncompliance with this act. Further, the Committee believes that any other costs would be so minimal that they could be absorbed by the Justice Department. The bill is not intended to raise the future Justice Department appropriations.

There has been so much discussion and review of the effect of the bill on consumer insurance rates. Certainly, there will be some shifting of costs. However, the Committee notes that the amount of increased or decreased costs to consumers will be determined by the insurance industry, competition, and the State Insurance Departments. The Com-

¹² Nondiscrimination in Insurance: Hearing on S. 2477 before the Subcommittee on Antitrust, Monopoly and Business Rights, of the Senate Committee on the Judiciary, 96th Cong. 2d Sess. 27 (1980) (testimony of Thomas Gillooly, Associate General Counsel, Health Insurance Association of America).

mittee believes that a shift in costs associated with health, life, disability and auto insurance will be tempered by use of factors other than sex; such as medical history, age, and occupation for disability, health and life insurance; and age, accident record, driving record, and mileage driver for automobile insurance. Further, the Committee believes that any shift in costs from one individual to another will result in a more fair rating system for all.

The most controversial costs associated with this bill have been the costs related to requiring that individuals not be discriminated against after the date of enactment with regard to benefits paid out for retirement plans, annuity contracts or pension funds. The effect of this provision is that the industry cannot reduce benefits to the discriminated sex but must "top up" or bring one's benefit up to the amount paid to the favored sex. The industry claims that the funds for "topping up" have not been planned for by the industry and that this "unfunded liability" falling on the industry will be costly. Thus far the industry has submitted cost figures ranging from \$5.5 billion to \$2 billion. The Committee received the \$2 billion revised estimate from the American Council of Life Insurance shortly before this report was filed and notes that the American Academy of Actuaries intends to revise its \$5.5 billion cost estimate soon. The Department of Labor has also made a cost study of "topping up" under the Equal Employment Opportunity Act and that study will be available soon. The Labor Department estimates of the unfunded liability for private pension plans are expected to be under \$500 million. It should be kept in mind that this unfunded liability compares to industry assets and reserves of over \$400 billion.

The Committee notes that the industry figures assume that the Equal Employment Opportunity Act does not require employees to provide equal individual benefits for equal individual contributions by employees to employer annuity, pension and retirement plans. The Committee disagrees with this industry assumption. Many judicial decisions hold that equal benefits are required, and the matter is now pending before the Supreme Court. However, even if the industry assumption is correct, the Committee believes the industry cost data thus far submitted to the Committee substantially overstates the likely cost of providing equal benefits.

It should be noted, however, that since at least 1972 employers and insurers have been on notice that title VII of the 1964 Civil Rights Act prohibited discrimination in insurance and annuities connected with employment. Therefore, this bill reaffirms that policy and makes it applicable to insurance and annuities purchased on an individual or private basis. Further, the Committee believes that the amount of unfunded liability incurred as a result of this provision is not substantial in relation to the total assets and reserves of the industry. For example, as previously explained, one estimate of unfunded reserves required to achieve equity in private pension plans is less than \$500 million annually—only 0.125 percent of the total private pension fund assets. With regard to employer plans: if enough employees have voluntarily terminated before the employer contributions on their behalf have vested, if investments brought a higher return than anticipated, or many other favorable contingencies affecting the funding have occurred, then there may not need to be additional funding to establish equal benefits at the preferred sex rate.

Insurers will make up this difference in future premiums and contributions.

Will gender-neutral actuarial tables materially impair insurers' financial strength or their ability to carry out their long-term obligations?

The insurance industry made the same arguments when certain States prohibited race-based actuarial tables; the fear proved unfounded. Moreover, insurance companies' rate structures have enormous built-in margins to protect them. Rates are based on highly conservative mortality tables and at interest rates way below the companies' investment earnings. TIAA-CREF, an annuity plan seeking to change to gender-neutral tables, studied the cost impact of using such tables. It found that the use of gender-neutral tables is "actuarially sound."

Will banning racial, sexual, and religious discrimination result in the breakdown of all insurance rating practices?

No, absolutely not. Prohibiting discrimination in certain categories—race, sex, and religion—where there have been historic patterns of invidious discrimination—is not intended to, and will not, affect other insurance ratings practices. Nothing in this bill will affect the practice of charging higher rates for fire insurance on wooden structures than are charged for similar brick structures. Nor does anything in this Act affect the practice of using age as a rating factor for life insurance and annuities. Congress has recognized that "age" is a different type of factor than race or sex, and has treated age differently with respect to insurance and pension plans. See 29 U.S.C. 623(f)(2).

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., November 12, 1982.

HON. BOB PACKWOOD,
Chairman, Committee on Commerce, Science and Transportation,
U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2204, the Fair Insurance Practices Act, as ordered reported by the Senate Committee on Commerce, Science and Transportation, October 1, 1982.

S. 2204 would prohibit certain actions by insurers, including discrimination on the basis of race, color, religion or sex. It would also allow the Attorney General to bring a civil action against alleged violators in the United States district court.

Enactment of S. 2204 would create a new area of responsibility within the Department of Justice (DOJ). As a result, it is expected that DOJ would establish a unit to review certain insurance practices and to litigate violations. Based on information from the Justice

Department, and assuming a mid-December date of enactment, it is estimated that the cost to DOJ for staff, overhead and other administration expenses would be a minimum of approximately \$200,000 in fiscal year 1983, and \$400,000 in each fiscal year thereafter. Costs could exceed these levels, however, if cases are numerous or particularly complex.

Enactment of S. 2204 would also establish a new area of jurisdiction for the United States district courts. While it is likely that the caseload of the district courts will be increased as a result of enactment of S. 2204, the extent of that increase cannot be estimated at this time. Rather than increasing the number of staff in the court system, however, it is likely that the new cases would simply lengthen the current backlog.

This bill is not expected to affect the various insurance programs administered by the Federal Government.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

INDIVIDUALS AND BUSINESSES AFFECTED

S. 2204, as reported, will impact on insurance and annuity companies who sell insurance or annuities to individuals or small businesses which are not subject to the Equal Employment Opportunity Act. Since the Committee believes the Equal Employment Opportunity Act prohibits discrimination in employment (including insurance benefits and retirement plans) on the basis of race, color, religion, national origin, and sex, the bill will simply apply what has been the law for employers to persons who purchase annuities or insurance as individuals.

S. 2204 will impact on individual consumers of insurance and annuities.

ECONOMIC IMPACT

The economic impact of the bill on persons affected by the bill will be to distribute insurance costs on a more equitable basis.

The effective date of the act will result in insurers "topping up" retirement plans, pension plans and annuities purchased prior to the effective date. This provision may result in a minimal increase in annuity, pension or retirement plans for individual consumers.

PERSONAL PRIVACY IMPACT

The bill will have no material impact on the personal privacy of individuals affected by the act.

PAPERWORK

Since most States do not authorize discrimination in insurance on the basis of race, color, national origin, or religion and in some cases

sex, the only paperwork impact will be in conforming State regulation of insurance to the Federal prohibition on sex discrimination in insurance. The Committee notes that conformity by State Insurance Regulators to the act is not directly required by the act.

The bill does not require any reporting to the Federal Government. Therefore, the additional paperwork required by the act is minimal.

SECTION-BY-SECTION ANALYSIS

SHORT TITLE

This section contains the short title of the bill, the "Fair Insurance Practices Act."

FINDINGS AND POLICY

Section 2.—Subsection (a) contains the Congressional finding that discrimination based on race, color, religion, or national origin, by an insurer (1) burdens the commerce of the Nation, (2) impairs the economic welfare of large numbers of consumers who rely on the protection of such policies and contracts, (3) constitutes an unfair trade practice which adversely affects commerce and (4) makes it difficult for employers to comply with Federal laws prohibiting such discrimination against their employees.

Subsection (b) declares U.S. policy to be that no insurer shall on the basis of race, color, religion, sex, or national origin of any individual or group of persons, (1) refuse to make insurance available to any applicant for insurance, (2) treat any applicant or insured differently than any other applicant with respect to terms, conditions, rates, benefits or requirements of any contract, or (3) commit any other discriminatory action prohibited by this act.

It is further the policy that the act not affect the responsibility and authority of States to regulate the business of insurance, or any regulation or order of a State agency concerning or applicable to the business of insurance if such regulation or order is consistent with and does not prevent compliance with this act.

DEFINITIONS

Section 3.—This section defines the following terms used in the act: "commerce", "discriminatory action", "insurance", "insured", "insurer", "activities affect commerce", "person", "sex", and "State".

"Commerce" means interstate commerce, "Discriminatory action" means action by an insurer which is unlawful under this act and contrary to the policy stated in section 2. "Insured" means any person who is insured under or is or may be an applicant for insurance under a contract of insurance issued or to be issued by the insurer. "Insurer" means any person who provides insurance to others or otherwise engages in the business of insurance and whose activities affect interstate commerce; utilize any facilities used in interstate commerce including the U.S. Post Office; or result in a discriminatory action carried on under color of law of the United States, any State or political subdivision.

The term "activities affect commerce" means any activity which involves any activity in interstate commerce, and includes any governmental activity.

"Sex" means the gender of the insured and includes pregnancy, childbirth, or related medical conditions of female insured, except that nothing in the act shall be considered to amend section 701(k) of the Civil Rights Act of 1964.

Section 701(k) of the Civil Rights Act of 1964 was amended in 1978 by the Pregnancy Disability Act. This act makes it clear that employers plans for health insurance coverage for employees include coverage of "pregnancy, childbirth or related medical conditions of female insured." Therefore, the bill is simply extending these benefits to those buying insurance on a private or individual basis.

UNLAWFUL DISCRIMINATORY ACTIONS

Section 4.—Subsection (a) makes it an unlawful discriminatory action for an insurer, because of race, color, religion, sex, or national origin of any person to do any of the following with respect to any person who applies for or is insured under an insurance contract:

- (1) To refuse to make or negotiate a contract of insurance of the type ordinarily made by such insurer; and
- (2) To treat such applicant or insured differently than the insurer treats others with respect to the terms, conditions, rates, benefits or requirements of such insurance contract.

Subsection (b) declares it to be an unlawful discrimination action for an insurer:

- (1) To utilize any statistical table or computation as a basis for an action contrary to this section;
- (2) To discriminate against a person because such person has opposed a practice made unlawful by this Act; or
- (3) To advertise that such insurer indicates any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin of a person.

The Committee is not questioning the fact that differences in rates for males and females have been observed in the past, nor that these differences are considered in estimating costs for the future. Our basic concern is that, when actuarial tables are sex-segregated, this frequently results in the payment of different benefits or the charging of different rates to males and females under the guise of "actuarial equivalence." Any such difference in payments or rates would constitute a violation of this act. The Committee has no quarrel with the actuary who insists upon his right to develop experience results by whatever group characteristics seem to have a substantive bearing on his results. The insurance industry, however, would have the obligation of seeing that the application of actuarial factors will not be used to establish differentials in benefits or rates between the sexes.

Subsection (c) (1) states that after the acts' effective date it shall be an unlawful discriminatory action to (1) charge or collect premium payments or contributions or (2) to pay to any insurer or other beneficiary under an insurance annuity or pension contract a payment based on the race, color, religion, sex, or national origin of any person or based on any statistical table who use would, if applied to contracts made after the effective date of this act, violate any provision of this section.

Further subsection (c) (2) authorizes an insurer to modify premium and contribution rates and may increase but not decrease the payments under existing contracts insofar as they are due after the effective date of this act, if necessary to comply with the nondiscrimination requirements of this act. A State agency with jurisdiction over the act must concur that the modification requested by the insurer is necessary. An insurer is not required to refund premiums and contributions payable to the insurer prior to the effective date of the act.

The insurer is not required to pay any additional amounts for benefits which were payable by the insurer prior to the effective date of this act.

The effect of this section is to require insurers after the date of enactment to pay benefits and collect premiums without regard for sex, race, color, religion, or national origin of an individual insured. For example, benefits paid by insurers under annuity contracts to individual men and women shall not be based on sex specific mortality tables. This is the most controversial portion of the act because non-discriminatory benefits will cause insurers to pay out some additional benefits for which they have not collected premiums.

It should be noted however, that at least since 1972, employers and insurers have been on notice that title VII of the 1964 Civil Rights Act prohibited discrimination in insurance and annuities connected with employment. Therefore this bill reaffirms that policy and makes it applicable to insurance and annuities purchased on an individual or private basis. While this section will result in some cost, it is necessary to assure that after the date of enactment discrimination against individuals insured on the basis of sex is stopped. If this section were to apply only to benefits paid out for contracts made after the date of enactment discrimination in retirement, annuity and retirement benefits would continue until the payment time some 20, 30, or 40 years in the future.

Subsection (d) states that nothing in the act shall be deemed to prevent an insurer who regularly provides insurance coverage solely to persons of a single religious affiliation from continuing to provide that insurance.

STATE OR LOCAL ENFORCEMENT PRIOR TO JUDICIAL ENFORCEMENT UNDER THIS ACT

Section 5.—Accords to State and local authorities the primary authority to enforce the State or local laws prohibiting discriminatory action as defined by this act before an aggrieved person may invoke the judicial remedy provided under section 6 of this act. Any complaint that an insurer has committed an unlawful discriminatory act must be presented within 180 days after the alleged discriminatory action occurred to the appropriate State agency designated by State law to handle these complaints, if the State has a law prohibiting any such discrimination and granting the State agency the authority to grant or seek relief from that discriminatory action.

CIVIL ACTION BY OR ON BEHALF OF AGGRIEVED PERSON

Section 6.—If a State or political subdivision of a State does not have a State or local law prohibiting discriminatory action or if the

State or local authority has failed within 60 days after receipt of written complaint to diligently take action against such insurer, a civil action against the insurer may be instituted in any State court having jurisdiction under State law or in a U.S. district court having jurisdiction under section 8 of this act.

Under request of the State or local authority or any party to the suit, the court may stay further proceedings for not more than 60 days pending the termination of State or local proceedings described in section 5.

CIVIL ACTION BY THE ATTORNEY GENERAL INVOLVING ISSUES OF GENERAL PUBLIC IMPORTANCE

Section 7.—This section authorizes the U.S. Attorney General to bring a civil action in a U.S. district court whenever the Attorney General has reasonable cause to believe that any person is engaged in a pattern or practice of resistance to the act.

JURISDICTION

Section 8.—A civil action under this act instituted in a U.S. district court shall be brought, without regard to the amount in controversy, in the U.S. district court in the judicial district in the State in which: (1) the alleged discriminatory action occurred, (2) the insurers principal office is located, (3) the insurer maintains and administers records relevant to the alleged discriminatory action, (4) the insurer resides or is located, (5) the insurer is incorporated or has a designated agent for service of process, or (6) the insurer transacts business. The case shall be heard at the earliest practicable time.

JUDICIAL RELIEF

Section 9.—Subsection (a) provides for the following judicial relief if a court determines an insurer committed a discriminatory action:

- (1) The respondent may be enjoined from committing any discriminatory action in the future;
- (2) The respondent may be ordered to amend the insurance contract;
- (3) The respondent may be required to reimburse the aggrieved person for all actual damages sustained by that person;
- (4) The respondent may be required to pay punitive damages, in addition to the actual damages of not more than \$25,000 for each individual plaintiff and not more than \$800,000 in the case of a class action (subject to guidelines in subsection (b));
- (5) The person aggrieved may recover court costs and attorney fees;
- (6) The court may order the equitable relief; and
- (7) The court may utilize the sanction of contempt to enforce its orders.

Subsection (b) requires the court in determining the amount of punitive damages to consider the amount of actual damages awarded, the frequency and persistence of the respondent's failure to comply with requirements of this act, the respondent's resources, the number of per-

sons affected, the extent to which the respondent was enriched through its discriminatory action and the extent to which the respondent's failure to comply was intentional.

INAPPLICABILITY

Section 10.—This section assures that the Social Security Act is not modified and that Executive orders or laws prohibiting discrimination in employment are not modified. Further, this act does not exempt any person from liability under any present law or future law which purports to require or permit the doing of any act which would be a discriminatory action under this act. This paragraph is not intended to create different obligations for employees under Title VII and insurers under this act. Rather, it is intended to preserve the EEOC's enforcement authority under Title VII, and to preserve the existing authority to enforce executive orders banning discrimination through administrative and judicial means.

EFFECTIVE DATE

Section 11.—The bill shall become effective 90 days after enactment.

CHANGES IN EXISTING LAW

In accordance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported will make no change to existing law.

MINORITY VIEWS OF MR. GOLDWATER

I opposed reporting out S. 2204 as I believe it is premature to act on a measure having far-reaching economic and legal ramifications without more fully considering its impact on individuals and on an area of regulation which, up to this point, has been left to the States.

In 1945, the Congress enacted the McCarran-Ferguson Act, which expressly reserved to the States the province of regulating the "business of insurance." This measure was adopted "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation."

The Supreme Court held, in 1945 in the *Southeastern Underwriters'* case, that the focus of this statute is on "the relationship between the insurance company and the policyholder." The Court found: "Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating 'the business of insurance.'"

It seems clear to me, therefore, that for over three decades it has been our intention, supported by the Supreme Court, to allow the States to regulate insurance.

It is my understanding that both State laws and insurance codes in nearly all States already prohibit unfair discrimination in the sale or pricing of insurance. Further, testimony has been presented that the National Association of Insurance Commissioners (NAIC)—the organization of State officials supervising insurance which promotes uniformity of legislation and regulation affecting insurance—very recently studied claims experience under life insurance, annuity and health insurance policies and found that actual experience justifies charging different premium rates by sex. In addition, the NAIC has adopted model legislation to eliminate unfair sex discrimination, and I am informed that many States have already adopted laws or regulations similar to this model.

One overlooked aspect of S. 2204, as ordered reported, is evidence that the financial integrity of life insurance companies could be adversely affected by the bill, particularly as it would apply to existing contracts. State laws setting reserve requirements for life insurers now take into account the differing risks between males and females. Changing the rate structure of policies issued over the past several years, without changing the underlying assumptions used in setting rates and reserves, could seriously jeopardize the industry's financial health and its ability to make full payments on claims.

Before acting, we should also consider the economic impact such legislation will have on the States. For example, the American Council of Life Insurance has estimated that a ban on the use of sex specific actuarial tables could result in an increase of costs of private insurance plans by as much as \$2 billion a year.

In addition, New York State Insurance Superintendent Albert B. Lewis has estimated that the cost to equalize the benefits of men and women in the New York State and New York City teachers and public employees retirement funds, as distinct from private plans, would be approximately \$1.9 to \$2.1 billion, all of which must come from State or local revenue sources.

And this is just one State. Mr. Lewis, I understand, has estimated that New York State accounts for approximately 10 percent of all State and local public pension premium costs in the country. If this is true, the national cost to the already financially-strapped State and

local governments and taxpayers could amount to as much as \$20 billion annually.

It is argued that S. 2204 will bring higher insurance or pension payments to women. This contention ignores that fact that in some areas, the bill will result in higher premium charges to women. Automobile insurance rating is one such area.

Under current State insurance rating practices, youthful female drivers are rated lower than their male counterparts. According to testimony submitted by the National Association of Independent Insurers, a trade association of over 500 property and casualty insurance companies, statistics show that as a group, all youthful male drivers under the age of 25 incur an average loss per insured vehicle that is 31 percent greater than their female counterparts. Should sex be removed as a classification factor, as S. 2204 would do, then young female drivers will have an average increase of 25 percent in liability premiums.

In terms of dollars and cents, this will mean that, as a result of passage of S. 2204, youthful females will have to pay an additional \$700 million a year for automobile insurance. In effect, the bill, if enacted, would force property and casualty insurance companies to unfairly discriminate against women by ignoring their proven safe driving record.

Further, it would be unwise for us to act on the measure at this time, inasmuch as there are outstanding court decisions which must be resolved. The Supreme Court, for example, has recently agreed to hear the *Norris v. Arizona Governing Committee* sex discrimination claim from the ninth circuit. In another case, *Peters v. Wayne State*, the U.S. Court of Appeals for the Sixth Circuit has handed down a unanimous decision that the use of sex-distinct mortality tables in the pricing of annuities does not lead to discriminatory treatment by employers purchasing such annuities to fund retirement plans. The decision conflicts with an earlier decision in the second circuit, *Spirit v. Long Island University*, on the same issue and the Supreme Court must, therefore, resolve this question. Clearly, we should allow the judicial process to function through its normal channels before further considering the issues proposed in S. 2204.

To sum up, I am not convinced that S. 2204 represents sound public policy and believe the issues involved require much further study and consideration before the Senate acts.

BARRY GOLDWATER.

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